IN THE

SUPREME COURT OF THE UNITED STATES

SUPREME COURT, U.S.
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OCTOBER TERM, 1969

No. 466

GUSTIN-BACON DIVISION, CERTAIN-TEED PRODUCTS CORPORATION, a corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA and LOCAL 41 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Gustin-Bacon Division, Certain-Teed Products Corporation, petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled cause on April 30, 1970.

OPINION BELOW

The memorandum and order of the District Court granting petitioner's motion for a more definite statement is re-

ported at 302 F.Supp. 759 (D.C. Kan., 1969), and is printed at Appendix A(1) *infra*. The memorandum and order of the District Court denying the motion of the United States to certify questions under 28 U.S.C.A. Section 1292(b), and dismissing the action under Rule 41(b), Federal Rules of Civil Procedure, is not reported, and is printed at Appendix A(2), *infra*. The opinion of the Court of Appeals is unreported to date, and is printed at Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeals below (Appendix B, *infra*) was dated and entered April 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTION PRESENTED

When Congress required that the complaint in a "pattern or practice" suit filed by the Attorney General under Section 707(a) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-6 (a)) "(set) forth facts pertaining to such pattern or practice", did Congress intend to require that the complaint set forth facts, as the trial court held, or that it merely give notice under Rule 8(a), Federal Rules of Civil Procedure, as the Court of Appeals held?

STATUTES AND RULES INVOLVED

1. Title VII, Section 707(a) of the Civil Rights Act of 1964 (42 U.S.C.A. Sec. 2000e-6(a)), effective July 2, 1964, provides in pertinent part:

> "(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance

to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

2. The Federal Rules of Civil Procedure provide in pertinent part:

Rule 8. General Rules of Pleading.

"(a) Claims for Relief. A pleading which sets forth a claim for relief * * * shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. * * *

* * *

"(e) Pleading to be Concise and Direct; Consistency.

"(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

* * *

Rule 9. Pleading Special Matters

"(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances

constituting fraud or mistake shall be stated with particularity. * * *

* * *

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings.

* * *

"(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. * * *"

STATEMENT OF THE CASE

This action was brought by the Attorney General on April 24, 1969, charging the petitioner herein with a "pattern or practice" of racial discrimination in hiring, job assignments, use of personnel tests in making job assignments, and promotions to supervisory positions, in violation of Title VII, Section 707 et seq. of the Civil Rights Act of 1964 (42 U.S.C.A. Sec. 2000e, et seq.). In pertinent part, the complaint filed by the Attorney General alleged[1]:

"8. Gustin-Bacon has engaged and is engaging in a pattern and practice of discrimination in employment against Negroes and other non-whites on account of their race in the operation of its Kansas City, Kansas plant. Such pattern and practice includes:

---

1. The complaint elsewhere alleged that petitioner was the employer at its Kansas City, Kansas, plant of approximately 1,006 persons. While not alleged, petitioner's operation, the handling and fabrication of glass fiber and refuse products, results in substantial turnovers of labor and literally hundreds of employment applications yearly.

"(a) Failing to hire Negro and other non-white applicants for employment who are more qualified than white applicants who apply for the same or similar positions and are hired.

"(b) Failing to assign its Negro and other non-white employees to the more desirable and better-paying jobs while reserving such jobs for its white employees and forcing out of such positions Negroes and other non-whites who have reached such jobs.

"(c) Administering and grading tests for assignment to jobs in such a manner as to give preferential treatment to white applicants and to exclude Negro and other non-whites similarly qualified.

"(d) Failing to provide opportunities for advancement to supervisory positions to its Negro and other non-white employees equal to those opportunities provided to its white employees.

"9. Certain provisions of the collective bargaining agreement entered into between Gustin-Bacon and the defendant union perpetuate the effects of the discriminatory acts and practices of Gustin-Bacon described in the preceding paragraph.

"10. The pattern and practice described in paragraphs 8 and 9 is of such a nature and is intended to deny the full exercise by Negroes and other non-whites of those rights secured to them by 42 U.S.C. 2000e-2 (a)." (Record on Appeal, Document 1, pp. 2-3).

Federal jurisdiction was invoked under 42 U.S.C.A. Section 2000e-6(b) and 28 U.S.C.A. Section 1345.

Local 41 filed an answer wherein *inter alia* it denied knowledge of the alleged pattern or practice of racial discrimination of petitioner, and itself; denied that the collective bargaining agreement perpetuated the effects of the alleged pattern or practice of petitioner; and denied that the pattern or practice attributed to it was intentional (Record

on Appeal; Document 2). On May 23, 1969, petitioner filed its motion for more definite statement; in pertinent part, as follows:

> "COMES NOW defendant Gustin-Bacon Division, Certain-Teed Products Corporation and moves the Court for an Order requiring the plaintiff to make his Complaint more definite in the following respects:
>
> "1. Sub-paragraphs 8(a), (b), (c), and (d) by alleging the facts pertaining to the alleged pattern and practice described in paragraph 8.
>
> "This defendant desires the following details as to said sub-paragraphs: the dates when and names of Negro and other non-white applicants for employment which the defendant allegedly failed to hire and the names of the white applicants who allegedly were hired; the dates when and names of those Negro and other non-white employees which the defendant allegedly failed to assign and the names of the white employees who allegedly were assigned; the dates when and names of those Negroes and other non-whites which the defendant allegedly forced out of such positions; the dates when and names of white applicants and excluded Negro and other non-whites among whom the preferential administration and grading of tests for assignment to jobs was allegedly made; the dates when and names of Negro and other non-white employees to whom the defendant allegedly failed to provide opportunities for advancement to supervisory positions and the names of the white employees who allegedly were provided such opportunities.
>
> "2. Paragraph 9, by alleging the provisions of the collective bargaining agreement which allegedly perpetuate the effects of the discriminatory acts and practices.
>
> "This defendant desires the following details as to said paragraph: the article, paragraph and sen-

tence(s) of said agreement which allegedly perpetuate the effects of the discriminatory acts and practices as described in said Complaint." (Record on Appeal, Document 4).

In support of its motion, petitioner submitted its brief stating in pertinent part:

> "Said motion is based on Federal Rule of Civil Procedure 12(e) and 42 U.S.C. Sec. 2000e-6, which expressly provides that the complaint shall set 'forth facts pertaining to such pattern or practice (of resistance to the full enjoyment, of any of the rights secured by this sub-chapter).' With the literally hundreds of applicants for employment and employees which this defendant has considered for employment or employs, it is impossible for this defendant to respond to said Complaint, paragraph 8. With the 69 pages and 44 separate articles contained in the collective bargaining agreement, it is impossible for this defendant to respond to the Complaint, paragraph 9." (Record on Appeal, Document 4).

The United States then responded to defendant's Motion for More Definite Statement and submitted a memorandum in support thereof (Record on Appeal, Document 5).

On June 25, 1969, the United States served on petitioner a notice of taking depositions of eleven of its employees. Petitioner, therefore, on July 2, 1969, moved the Court for a protective order staying the taking of the depositions by the United States (Record on Appeal, Document 6). Despite petitioner's motion, subpoenas were thereafter served upon seven of petitioner's employees and personnel requiring them to appear at the taking of depositions and to bring with them voluminous personnel records and documents covering periods of time since 1960. Thereafter the taking of depositions and further discovery was ordered stayed by a journal entry dated July 11, 1969, until the Court had ruled upon the motion for a more definite statement.

On August 11, 1969, after a hearing, the District Court entered its memorandum and order granting the motion for a more definite statement, stating:

> "I have examined the authorities pertinent to the questions which the motion raises and in particular the language of Sec. 2000e-6(a). That provision in unmistakable terms requires that facts pertaining to a pattern or practice of discrimination be alleged in the complaint. The government argues and has presented authority from other districts that Congress, in using this language, did not intend to displace the notice pleading concept embodied in the Rules of Civil Procedure. However, the 1964 Civil Rights Act was enacted *after* the adoption of the Civil Rights which, to me, is persuasive that Congress did intend more than the giving of notice in cases initiated under the Act. I do not believe that the very specific requirements which a complaint must meet under Sec. 2000e-6(a) were the result of congressional inadvertence or that Congress did not intend the clear import of the words used in this section. Perhaps the lawmakers feared harassing or sham actions with no basis in fact, and believed that a complaint or charge that was factual in nature would alleviate this danger. * * *" (Memorandum and Order, dated August 11, 1969, Reported at 302 F.Supp. 759 (D.C. Kan., 1969); Record on Appeal, Document 12).

The United States then moved to certify questions for appeal under 28 U.S.C.A. Section 1292(b) or, in the alternative, for involuntary dismissal; stating that it declined to comply with the Court's order, but stating that it was "prepared, however, to specify the provisions of the collective bargaining agreement referred to in Paragraph 9 of the Complaint" (Record on Appeal, Document 14). By its order entered September 18, 1969, the District Court declined to certify the questions suggested by the United States for interlocutory appeal, and directed that the action be dis-

missed under the provisions of Rule 41(b), Federal Rules of Civil Procedure (Record on Appeal, Document 15).

The Government thereafter filed its appeal on November 14, 1969, and the appeal was docketed. Briefs on appeal were filed by all parties, and after oral arguments the Court of Appeals issued its opinion setting aside the action of the trial court and remanding the cause (Memorandum Opinion, Appendix B). Judgment in accordance with the opinion was entered on April 30, 1970 (Certiorari Record, Document 4, Appendix B). The Court of Appeals thereafter issued an order recalling and staying its mandate pursuant to Rule 41(b), Federal Rules of Appellate Procedure, and subsequently granted petitioner's motion for an order extending the stay of mandate to permit petitioner to prepare and file this petition (Certiorari Record, Document 8, 9).

REASONS FOR GRANTING THE WRIT

This case involves an important question concerning the administration of the Civil Rights Act of 1964 by means of a "pattern or practice" suit brought by the Attorney General under Section 707 of Title VII (42 U.S.C. Sec. 2000e-6). Section 707 of Title VII of the Civil Rights Act of 1964 authorizes the Attorney General, upon a determination of reasonable cause, to bring a civil action in the appropriate District Court of the United States for relief from a "pattern or practice of resistance to the full enjoyment of any of the rights secured by this Subchapter, * * *". Section 707(a) also prescribes the manner in which such a "pattern or practice" suit is to be instituted. The action is to be commenced:

> "* * * by filing with (the district court) a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) *setting forth facts pertaining*

to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible * * *" (42 U.S.C. Sec. 2000e-6(a)). (Emphasis supplied).

The case at bar ultimately rests upon a proper interpretation or construction of this provision of the Civil Rights Act of 1964. This Court has not previously considered or decided the question raised.

The Court of Appeals below held that a "pattern or practice" suit may be instituted merely by "notice" to the defendant within the meaning of Rule 8(a), Federal Rules of Civil Procedure, and set aside the trial court's order requiring a more definite statement, and its subsequent action dismissing the case for refusal to comply with the order. In doing so, the Court of Appeals ignored the plain language of Section 707(a), and eliminated from the Act the procedural safeguard included in Section 707(a) by Congress. Section 707(a) plainly requires that a "pattern or practice" complaint "(set) forth facts pertaining to such pattern or practice". This language was not the result of Congressional inadvertence. It was expressly pointed out by Senator Dirksen, a cosponsor of the Senate amendment which became the Civil Rights Act, in the course of Senate floor debate thereon (110 Cong. Rec. 12819 (1964)). The plain import of the language of the Act as it was written by Congress cannot be disregarded (*Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 202-203, 8 L.Ed.2d 440, 82 S.Ct. 1328 (1962)). The language of an act is the fundamental guide to, and the most persuasive evidence of, legislative intent (*Birmingham* v. *Rucker's Breeding Farm*, 152 F.2d 837 (C.C.A. 8th Cir., 1945)).

Although the government has dismissed this requirement as a "burdensome pleading requirement" (Brief for

the United States on Appeal, page 35), the requirement was deliberately included in Section 707(a) to assure that such actions are brought only upon "reasonable cause", and thus as singular protection for courts and potential defendants against uninvestigated or unbased charges of racial discrimination, and it should not be so lightly discarded. It is the unique nature and extreme consequences of a "pattern or practice" suit, together with the unusual legislative history of Title VII "pattern or practice" suits which led to the inclusion therein of the requirement that the facts in the possession of the Attorney General "pertaining to such pattern or practice" be set forth *in the complaint.*

Section 707(a), which is similar to Section 206(a) of Title II (42 U.S.C. Sec. 2000a-5; public accommodations), established an entirely new cause of action based upon a "pattern or practice of resistance to the full enjoyment of * * *" Title VII rights (110 Cong. Rec. 12812-12820, Comments of Senator Dirksen). The objective of such suit is not merely the determination of one of more "unlawful employment practices" of an employer, employment agency or labor organization (see 42 U.S.C. Sec. 2000e-2). A "pattern or practice" is not established by evidence of "mere isolated acts of discrimination (110 Cong. Rec. 14270, Remarks of Senator Humphrey). Rather, a "pattern or practice" suit is a broad assault, potentially calling into question every aspect of a defendant's personnel practices over an indefinite period of time. (See *United States* v. *Hayes International Corporation*, 415 F.2d 1038 (C.A. 5th Cir., 1969); *United States* v. *Sheet Metal Workers International Association, Local Union No. 36, AFL-CIO*, 416 F.2d 123 (C.A. 8th Cir., 1969); *Local 189 United Papermakers and Paperworkers, AFL-CIO, CLC*, 416 F.2d 980 (C.A. 5th Cir., 1969)). By filing such a com-

plaint, the Attorney General casts upon a defendant an immense economic burden of investigation, pretrial discovery, and legal defense, which is not measured alone by the amount of court costs and attorneys' fees. (See 42 U.S.C. Sec. 2000e-5(k)). This is especially true where, as in the case at bar, no previous notice or warning is given, nor efforts made to secure the voluntary cooperation and compliance of the defendant. Filing such a suit casts upon the Court the task of inquiring into "patterns" and "practices" over long periods of time, analyzing varying numbers of individual acts and practices, together with the environment and circumstances under which they occurred, and intervening into an extremely complex subject matter and system of rights (See Gould Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964, 13 How. L. Jnl. 1 (1967). Moreover, performance of this task is to be "in every way expedited" (42 U.S.C. Sec. 2000e-6(b)).

It is not enough to say, as did the Court of Appeals, that the factual basis for "reasonable cause" for filing the complaint may be ferreted out by the tools of pretrial discovery. While a complaint filed before the Equal Employment Opportunity Commission under Section 706(a) initiates only an administrative investigation and conciliatory efforts (42 U.S.C. Sec. 2000e-5(a)), the complaint of the Attorney General charging a "pattern or practice" of discrimination precipitates a right of discovery under the Federal Rules of Civil Procedure and carries with it the potentiality of a mandatory court order. It is at the pleading stage when the propriety of initiating the suit must be reviewed, if at all, else the provision is meaningless. Congress thus expressly required a showing *in the complaint* to the satisfaction of the district court of the specific facts pertaining to the "pattern or practice".

Title VII was first proposed on the floor of the Senate as a portion of an amendment to H. R. 7153 (88th Cong. 1st Sess. 1963), in the nature of a substitute bill, the substitute having been worked out informally as a compromise between Senate leaders of both parties with the aid of Justice Department officials. (See: E.E.O.C., Legislative History of Titles VII and XI of Civil Rights Act of 1964, Part IV(a), p. 3003). Of this substitute, Mr. Berg, formerly Deputy General Counsel and Acting General Counsel of the Equal Employment Opportunity Commission as well as Attorney with the Department of Justice, has stated:

> "It was obvious from the outset that cloture could not be obtained for any civil rights bill which did not represent a broad bi-partisan consensus. The Administration's task, therefore, was to fashion a compromise bill which would receive the active support of Senator Dirksen, the minority leader. During April and May this compromise was worked out by the bill's floor leaders, the Department of Justice, Senator Dirksen, and other Republican Senators not previously committed to support of the bill. The compromise took the form of an amendment substituting a completely revised bill for that passed by the House." Berg, Equal Employment Under the Civil Rights Act of 1964, 31 Brooklyn L.R. 62, 66 (1964).

He also observed:

> "The necessity for and the difficulties in obtaining the two-thirds vote for cloture must be borne in mind in any attempt to understand the amendments to the bill adopted in the Senate, and particularly the amendments to Title VII."

To the same effect are the remarks of Senator Holland, during debate on the substitute amendment:

> "I know that all the amendments are not pleasing to any one group within the Senate. Some of them are pleasing to those of us who have opposed the bill vigorously. Others were manifestly conceived with the idea of obtaining support for cloture from Senators from other States outside the South, who were not strongly for the bill and who wanted to have preferential treatment, which is given them in title II and title VII of the bill." 110 Cong. Rec. 14221.

Title II and Title VII, of course, are the two titles of the Civil Rights Act which the Dirksen compromise amended; which amendments specified that the attorney general's pattern or practice complaint must "(set) forth facts".

The most fundamental changes effectuated by the substitute related to the methods of enforcement of the act. (110 Cong. Rec. 12721-12725 (1964); Comments of Senator Humphrey.) Title VII omitted from the bill the authority of the Equal Employment Opportunity Commission to resort to the courts for enforcement. Responsibility for enforcement of the provisions prohibiting "unlawful employment practices", in the event voluntary compliance was not forthcoming, was allocated to the individual complainant, although authority was reserved to the Attorney General to intervene in such suits under certain circumstances (Ibid; See 42 U.S.C. Sec. 2000e-5). However, the substitute added the unprecedented provision authorizing "pattern or practice" suits by the Attorney General (110 Cong. Rec. 12721-12725, Comments of Senator Humphrey; 110 Cong. Rec. 12812-12820, Comments of Senator Dirksen). No explanation or analysis of the particular language of Section 707(a) in question occurred. The significance of the provision thus can only be drawn from the language itself and its surrounding context.

Unlike Section 706, governing administrative and judicial proceedings arising from a charge of "an unlawful em-

ployment practice", Section 707(a) omitted any requirement that the Attorney General investigate complaints of discrimination, or make any effort to obtain voluntary compliance by informal methods before filing suit. Section 707 was addressed expressly to the Attorney General (not a Commission member as in Sec. 706(a)), regarding "pattern or practice" suits, and authorized such an action in a District Court "(w)henever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, * * *" (42 U.S.C. Sec. 2000e-6(a)). Section 707(a) did not prescribe or limit the sources upon which the Attorney General's determination of reasonable cause must be based. Thus, although Section 707(a) required that institution of a "pattern or practice" suit be supported by some reasonable basis in fact, the sole procedural safeguard to assure that such factual basis exists was the requirement that "facts pertaining to such pattern or practice" be set forth in the complaint. A similar requirement was included in Section 206(a) of Title II governing "pattern or practice" suits charging discrimination in public accommodations.

On the other hand, where Section 706 and other subchapters of the Act provided for enforcement by resort to the courts, no particular manner of instituting the action was prescribed, and no requirements as to the contents of the complaint were set forth. (See: 42 U.S.C. Sec. 2000e-5(e); 42 U.S.C. Sec. 2000a-3(a); 42 U.S.C. Sec. 2000b(a); 42 U.S.C. Sec. 2000c-6(a)). As to such actions, it may legitimately be said that the usual Federal Rules of Civil Procedure are controlling. The reasons for the distinction are obvious. Where the civil action is commenced by a com-

plaint charging a specific act or practice violative of the act, adequate protection and notice to the defendant is provided by "a short and plain statement of the claim" (Rule 8, Federal Rules of Civil Procedure). Where provision is made for the prior investigation of a charged discriminatory act or practice, and for prior efforts to secure voluntary correction of such violations of the act, the propriety of resorting to the courts in the particular case is unquestionable. No further protection to the courts and potential defendants is necessary.

As to Section 707 therefore, the conclusion must be that although its framers created in the Attorney General an extremely powerful tool of enforcement in the nature of a "pattern or practice" suit, they did not leave in him absolute, unfettered power to wield it. By the provision that he sue only upon a determination of "reasonable cause", they required the assembly of credible facts tending to show such "pattern or practice" prior to his action. By the provision that he set out such facts in his complaint, they assured the judicial review of his decision. The plaintiff's attempt to disregard the requirement of the statute that the complaint set forth facts is well answered by what this Court said of a similar effort by the government to disregard the procedural prescriptions of a statute. In the case of *United States* v. *Zucca*, 351 U.S. 91, 100 L.Ed. 964 (1956), the Court held that the provision of the Nationality Act, 8 U.S.C. Section 1451(a), authorizing the United tates Attorney to institute denaturalization proceedings "upon affidavit showing good cause therefor" must be observed. The Court stated, in words equally applicable to this case:

> "We think that the public interest is not served by taking such liberties with a specific statutory requirement. . . ." 351 U.S., at page 98.

Not only does this provision requiring pertinent facts to be set out in the complaint provide some restraint upon the power to invoke Section 707(a) by a "pattern or practice" suit, it incorporates therein a measure of restraint upon the potential use of a "pattern or practice" suit as a fishing expedition or *ex parte* inquisition. The filing of a mere notice of a claim of "pattern or practice" of racial discrimination in employment, potentiates inquiry into any and all employment and personnel acts and practices of a defendant over an unlimited period of time. Rules 26 and 34, Federal Rules of Civil Procedure limit the scope of pretrial examination and inquiry to matters. "relevant to the subject matter involved in the pending action". Thus, unless the specific facts pertaining to the broad allegations of discriminatory employment practices such as hiring, job assignments, use of bids, and promotion, are set forth in the pleading, the matters subject to examination and inquiry are limitless, and their relevance to the subject matter involved in the pending action cannot be determined by the defendant or the court. Such a use of Section 707(a) was not intended by Congress. (See 110 Cong. Rec. 7215-7218 (1964)—Responses of Senator Clark, one of the floor managers of H. R. 7153, to questions of Senator Dirksen prior to introduction of the compromise bill.)

The Court of Appeals relied heavily upon Rule 8(a) of the Federal Rules of Civil Procedure which provides that a pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief". Under the Federal Rules of Civil Procedure, the basic function of pleadings is "notice" (5 Wright & Miller, Federal Practice and Procedure: Civil Section 1202, page 60). The Court of Appeals, however, ignored the fact that the Federal Rules of Civil Procedure preserve prior practice regarding the detail in which certain matters must be pleaded (5 Wright & Miller, supra, Section 1291, page 389). The rules recog-

nize that due to the nature of certain actions "a short and plain statement of the claims showing that the pleader is entitled to relief" (Rule 8, F.R.Civ.P.) is inadequate, and that the pleadings in such actions should perform additional functions. Thus, Rule 9(b) directs that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. * * *" There are a variety of reasons for requiring particularity in the pleading of fraud or mistake. Allegations of fraud or moral turpitude are serious charges and one is not permitted to present such a claim unless he is in a position and is willing to record in the claim what the alleged fraud consists of, specifically. (See *Chamberlain Mach. Works* v. *United States*, 270 U.S. 347, 70 L.Ed. 619, 46 S.Ct. 225 (1926); *Stearns* v. *Page*, 7 How. (48 U.S.) 819, 12 L.Ed. 928 (1948).) Secondly, fraud and mistake embrace such a wide variety of potential conduct that conclusory allegations in the pleadings are meaningless. The very nature and scope of the subject matter of such a suit cannot be determined without a substantial amount of particularized information. Enforcement of Rule 9 thus enables the defendant, in responding to the complaint, to help formulate the issues to be tried, and provides the court with information upon which to judge the permissible scope of pretrial discovery. (*Trussel* v. *United Underwriters, Ltd.*, 227 F.Supp. 757, 774 (D.C. Colo., 1964); 5 Wright and Miller, supra, Section 1296, pages 399-400).

The parallel between the language and function of Rule 9, Federal Rules of Civil Procedure, and that of the requirement of Section 707(a), that "facts pertaining to such pattern or practice" be set forth in the complaint is obvious. The courts have consistently observed a requirement of specificity in the allegation of a complaint for a violation of the Civil Rights Act (42 U.S.C., Sections 1983; 1985; 1986). Since these acts broadly grant a cause of

action covering a wide range of civil rights granted by the Constitution, general and conclusory allegations have been held insufficient. (*Powell* v. *Workmen's Compensation Bd. of State of New York*, 326 F.2d 131, 136 (C.A. 2nd Cir., 1964); *Valley* v. *Maule*, 297 F.Supp. 958 (D.C. Conn., 1968); *Allison* v. *Wilson*, 277 F.Supp. 271 (D.C. Cal., 1967); *Roberts* v. *Barbosa*, 227 F.Supp. 20 (D.C. Cal. 1964); *Negrich* v. *Hohn*, 329 F.2d 213 (3rd Cir., 1967); *Kauffman* v. *Moss*, 420 F.2d 1270 (C.A. 3rd Cir., 1970)). As the District Court observed in *Valley* v. *Maule*, supra:

> "Plaintiffs argue that in federal practice a complaint need not set forth detailed facts, but the Federal Rules of Civil Procedure adopt the theory of 'Notice of Pleading'. See *e. g.*; *Conley* v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).
>
> "* * * As a general rule, notice pleading is sufficient, but an exception has been created for cases brought under the Civil Rights Act. The reason for this exception is clear. * * * It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the Federal Courts open to legitimate claims * * *." (*Valley* v. *Maule*, supra at 960).

The drafters of Titles II and VII (42 U.S.C. Sec. 2000a-5, 2000e-6) similarly appreciated the special nature and seriousness of the claim of a "pattern or practice" of racial discrimination. Accordingly, they required similar specificity in complaints commencing such actions.

Whether the drafters specifically considered the effect of the provision upon Rule 8 can only be the subject of speculation. The plain language chosen, however, together with a consideration of the official to whom it applies, and the special circumstances under which it is operative, discloses clear inconsistency with Rule 8, and com-

pels the conclusion that the requirement takes precedence over Rule 8 in "pattern or practice" suits. There can be no question as to the power of Congress to so displace Federal Rules of Civil Procedure in particular instances:

> "By virtue of the rule-making Act of 1934 [28 U.S.C. Section 2072] the Federal Rules superseded or modified federal statutes in force on September 16, 1938, the effective date of the Rules, which are in conflict with them. *A clearly inconsistent statute enacted subsequent to that date would, however, supersede or modify any Federal Rule in conflict therewith, . . .*" 2 Moore, Federal Practice, paragraph 1.02[5], page 128 (2d Ed.) (Footnotes omitted. Emphasis supplied).

> ". . . *Congress* which has always exercised a plenary power over federal jurisdiction and practice *could by statute supersede any or all of the* Rules. But unless the congressional intent so to do is clearly stated, a subsequently enacted statute should be so construed as to harmonize with the Federal Rules if that is at all feasible. *If, however, there is a clear inconsistency then the Rule must give way because of the paramount power of Congress. . . .*" 7 Moore, Federal Practice, paragraph 86.04[4], page 4966 (2d Ed.) (Emphasis supplied).

A procedural rule "is without force as against conflicting statutory provisions." *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430, 434, 77 L.Ed. 408 (1932). Compare *Penfield Co.* v. *Securities & Exch. Com.*, 330 U.S. 585, 590, fn. 5, 91 L.Ed. 1117 (1947): "Where a Rule of Civil Procedure conflicts with a *prior* statute, the Rule prevails" (Emphasis supplied). In addition, a statute governing a special proceeding will control over a conflicting Federal Rule. *District of Columbia* v. *Pace*, 320 U.S. 698, 703, 88 L.Ed. 408 (1944). Congress has on a prior occasion enacted a statute requiring specific pleading. As stated in 1A Barron & Holtzoff, Federal Practice & Procedure, paragraph 251, page 36, fn. 9:

> "Congress subsequently enacted a statute requiring a certain amount of special pleading in patent infringement actions. 35 U.S.C.A., Paragraph 282. This statute must be taken to control over the contrary provisions of Rule 8."

Just as Rule 12(e) motion for more definite statement is used to enforce the requirements of Rule 9 that the circumstances constituting the alleged fraud shall be stated with particularity, it is a proper means of enforcing the requirement of Section 707(a) that the complaint "(set) forth facts pertaining to" the alleged pattern or practice. Rule 12(e) is primarily directed at vague or unintelligible allegations and its primary function is to enable the responding party to prepare a response. It is not a device of pretrial discovery. (*Fairmont Foods Company* v. *Manganello,* 301 F.Supp. 832 (D.C.-N.Y., 1969). The burden of fact elicitation is allocated to the discovery phase of the proceeding, and the courts thus have assumed a restrictive attitude toward the use of Rule 12(e). Nonetheless, there is one context in which a relatively liberal approach to the granting of Rule 12(e) motions has been taken. Since Rule 9 itself contains no device for enforcing its special pleading requirements, Rule 12(e) is commonly used for that purpose. (See 5 Wright and Miller, supra, Section 1376, page 742; and cases cited footnote 57.) Thus, where there is imposed a special pleading requirement that the claim be particularized by the statement of pertinent supporting facts and circumstances, vagueness or ambiguity in the pleading is not the sole test of the need for a more definite statement. Where such a pleading requirement is imposed, the claimant is not allowed to withhold the facts underlying his claim and the particular issues to be raised until after pretrial discovery has been completed. Due to the statutory direction as to pleading, the pleader to a certain extent loses the advan-

tages he otherwise would have under the "notice" requirement of Rule 8.

Rule 12(e) is interlocutory in nature and addressed to the discretion of the trial court. (*Walling* v. *Fairmont Creamery Company*, 139 F.2d 318 (C.A., 8th Cir., 1943); *Mitchell* v. *E-Z Way Towers, Inc.*, 269 F.2d 126, 130 (C.A., 5th Cir., 1959).) When a Rule 12(e) motion is employed to secure compliance with the special pleading requirement of Rule 9, the Court's discretion is directed to the question whether the pleading meets the applicable standards for that rule. (*Trussell* v. *United States Underwriters, Ltd.*, 228 F.Supp. 757, 774 (D.C. Colo., 1964); *Kuenzell* v. *United States*, 20 F.R.D. 96, 99-100 (D.C. Cal., 1957); *C. F. Carrigan* v. *California State Legislature*, 263 F.2d 560, 565-566 (C.A., 9th Cir., 1959), *cert. denied* 359 U.S. 980, 3 L.Ed.2d 929, 79 S.Ct. 901 (1959).) The sufficiency of a particular pleading under Rule 9(b) depends upon a number of variables. Among these are the factual context in which the fraud is alleged to have occurred, whether the details are in the possession of the pleader or of some third party, the complexity of the transaction in question, and the amount of detail necessary to give adequate notice to the adverse party and to permit a determination of the issues raised (5 Wright and Miller, supra, Section 1298, pp. 408-415). To these factors should be added the consideration that the requirements of Rule 9(b) may serve a means of reviewing the propriety of the charges, and the factual basis therefor, in order to eliminate at the pleading stage unfounded and unsupported allegations. (5 Wright and Miller, supra, Sec. 1296.) Rule 12(e) has similarly been used in actions under the Civil Rights Act to invoke the court's discretion as to whether the charge should be particularized. (See *Valley* v. *Maule*, supra).

Rule 12(e) was thus used in the case at bar to enforce the requirement of Section 707(a) that the complaint "(set) forth facts pertaining to the pattern or practice". Petitioner's motion invoked the court's discretion whether to require the government to support its broad allegation of a pattern or practice of racial discrimination in the hiring, job assignment, use of personnel tests in making job assignments, and promotions to supervisory positions. The motion was granted, and the government apparently was unable or unwilling to comply. The action of the District Court was similar to that of the Court in *United States* v. *H. K. Porter Company, Inc.*, (D.C. Ala., No. 67-363, (July 28, 1967), unreported; copies of the order granting defendant's motion, and the complaint upon which it was based are printed in Appendix C to this petition).

It is submitted finally, thus, that Section 707(a) extends to the court the authority to review the sufficiency of the alleged facts upon which the action of the Attorney General is taken, and the discretionary power to require the allegation of supporting facts. Whether the case may be better expedited (see 42 U.S.C., Sec. 2000e-6(b)) by granting the motion also must rest within the court's discretion. Since Section 707(a) forbids the filing of a "pattern or practice suit" unless the Attorney General has in his possession facts creating the requisite "reasonable cause", little delay is to be expected from requiring that such facts be disclosed in the complaint. Of course, where the Attorney General chooses to fully disclose in the complaint at the outset the facts in his possession, no delay whatsoever may be expected. The question is addressed to the sound discretion of the trial court, based upon a great variety of variable factors arising from the particular "pattern or practice" alleged, and such discretion should not be disturbed in the absence of a clear abuse thereof.

The trial court did not abuse its discretion in the case at bar. The complaint filed by the Attorney General in the case at bar alleged broad conclusory statements of the alleged "pattern and practice". No dates, periods of time, or identification of actions or incidents known to the government were stated. The "circumstances constituting fraud" which are to be stated with particularity under Rule 9(b) are commonly considered those matters such as the time, place, and contents of the false representations, as well as the identity of the person making the representation and what he obtained thereby (5 Wright and Miller, supra, Sec. 1297, page 403). It was within the discretion of the court to require similar specificity with regard to the instant allegations of racial discrimination. The government's inability or refusal to comply with the order of the court therefore constituted just cause for dismissing the action pursuant to Rule 41(b), Federal Rules of Civil Procedure.

The decision of the Court of Appeals, based on a construction of Section 707(a) which would deprive the trial court of its discretionary power, should be reversed.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A(1)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA
Plaintiff

vs.

GUSTIN-BACON DIVISION CERTAIN-TEED PRODUCTS CORPORATION, a Corporation; LOCAL 41 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA
Defendants

No. KC-2967

Memorandum and Order

(Filed August 11, 1969. Charles W. Cahill, Clerk)

This matter is before the court on the motion of defendant Gustin-Bacon for a more definite statement. The United States brought this action under 42 U.S.C. § 2000e-6, seeking an injunction against discriminatory employment practices allegedly being followed by the defendant. The motion is directed to paragraphs 8 and 9 of the complaint, which charge violations of the Civil Rights Act of 1964. Defendant contends that information concerning the dates and names of parties involved in the alleged violations of the Act set forth in paragraph 8 are necessary to enable it to frame its responsive pleading. Paragraph 9 of the complaint refers to "certain provisions" of the collective bargaining agreement between defendant Gustin-Bacon and defendant Local 41 of the International

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America which "perpetuate the effects of the discriminatory acts and practices of Gustin-Bacon." Specifically, the defendant desires that paragraph 9 of the complaint be amended to show the precise provisions of the agreement which constitute a violation of the Act.

I have examined the authorities pertinent to the questions which the motion raises and in particular the language of § 2000e-6(a). That provision in unmistakable terms requires that facts pertaining to a pattern or practice of discrimination be alleged in the complaint. The government argues and has presented authority from other districts that Congress, in using this language, did not intend to displace the notice pleading concept embodied in the Rules of Civil Procedure. However, the 1964 Civil Rights Act was enacted *after* the adoption of the Civil Rules which, to me, is persuasive that Congress did intend more than the giving of notice in cases initiated under the Act. I do not believe that the very specific requirements which a complaint must meet under § 2000e-6(a) were the result of congressional inadvertence or that Congress did not intend the clear import of the words used in this section. Perhaps the lawmakers feared harassing or sham actions with no basis in fact, and believed that a complaint or charge that was factual in nature would alleviate this danger. I must, therefore, respectfully decline to follow *United States* v. *Building & Construction Trades Council of St. Louis, Mo.*, 271 F. Supp. 447 (E.D. Mo. 1966) and *United States* v. *International Brotherhood of Electrical Workers, Local No. 683*, 270 F. Supp. 233 (S.D. Ohio 1967) to the extent that they construe § 2000e-6(a) as not requiring the allegation of "facts pertaining to such pattern or practice."

In *Bowaters Southern Paper Corporation* v. *Equal Employment Opportunity Commission,* Civil No. 5351, E.D. Tenn., May 5, 1969, the court reached the same conclusion that I have reached. Although that case dealt with the sufficiency of a charge by an EEOC Commissioner under § 2000e-5(a) rather than a complaint filed by the Attorney General under § 2000e-6(a), Congress has in closely similar language required in each of these subsections that facts supporting the complaint or charge be alleged. Furthermore, all of the provisions of § 2000e have the same purpose—to eliminate employment discrimination based upon race, religion, sex, or national origin. Congress has provided both an administrative and judicial procedure for eliminating such discrimination, but requires in either case that the party initiating the action state the facts which are alleged to constitute a violation of the statute.

As to paragraph 9 of the complaint, *Reed* v. *Fawick Airflex Company,* 86 F. Supp. 822 (N.D. Ohio 1949) and *United Electrical, Radio & Mach. Workers of America (CIO) Local* 735 v. *Harris-Seybold Co.,* 8 F.R.D. 422 (N.D. Ohio 1948), demonstrate instances in which motions for more definite statement were granted with respect to similar complaints. Although both involved breach of collective bargaining agreements, rather than a question under the Civil Rights Act of 1964, the following language from *Harris-Seybold* is equally applicable to this case:

> "* * * Further, if it is alleged that less than the entire contract has been breached, the specific portions allegedly breached should be identified." (pp. 423-24)

Since the government has alleged that only certain provisions of the collective bargaining agreement between the two defendants in this case perpetuate the discriminatory

practices of Gustin-Bacon, it should identify the provisions of the agreement that have this effect.

IT IS ORDERED that the motion of defendant Gustin-Bacon for a more definite statement be granted.

Dated at Kansas City, this 11th day of August, 1969.

(Signed) Arthur J. Stanley, Jr.
Chief Judge

APPENDIX A(2)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff vs. GUSTIN-BACON DIVISION, CERTAIN-TEED PRODUCTS CORPORATION, ET AL., Defendants	No. KC-297

Memorandum and Order

(Filed, Entered in the Docket: September 18, 1969.
Charles W. Cahill, Clerk, By /s/ Betty
L. Ross, Deputy)

The government moves that the court certify under 28 U.S.C. § 1292(b) the question determined by the orders entered July 11 and August 11, 1969. In the alternative, stating that it will decline to comply with the order of August 11, involuntary dismissal is urged in order that an appeal may be taken under 28 U.S.C. § 1291.

I am of the opinion that an interlocutory appeal from the order would not substantially advance the ultimate determination of the litigation although a controlling ques-

tion of law is involved and although there is substantial ground for difference of opinion. I must therefore decline to certify the questions under 28 U.S.C. § 1292(b).

IT IS ORDERED that plaintiff's motion to certify questions under 28 U.S.C. § 1292(b) be denied and, the plaintiff having declined to comply with the order of August 11, 1969,

IT IS FURTHER ORDERED, under the provisions of Rule 41(b), Federal Rules of Civil Procedure, that this action be and it hereby is dismissed.

Dated at Kansas City, this 17th day of September, 1969.

/s/ Arthur J. Stanley, Jr.
Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH, 1970, TERM

UNITED STATES OF AMERICA,
Appellant,

vs.

GUSTIN-BACON DIVISION, CERTAIN-TEED PRODUCTS CORPORATION, a Corporation, and LOCAL 41 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA,
Appellees.

No. 713-69

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(DISTRICT COURT No. KC-2967)

(Filed, April 30, 1970, in the United States Court of Appeals, Tenth Circuit. William L. Whittaker, Clerk)

Dennis F. Gordon, Attorney, Dept. of Justice, Washington, D. C., (Jerris Leonard, Assistant Attorney General, Washington, D. C., David L. Rose, Attorney, Dept. of Justice, Washington, D. C., and Robert L. Roth, United States Attorney, Kansas City, Kansas, on the brief) for Appellant;

Leonard O. Thomas, Kansas City, Kansas, (William H. Sanders and William C. Nulton, Kansas City, Missouri, on the brief) for Appellee Gustin-Bacon Division, Certain-Teed Products Corporation;

Joel Pelofsky, Kansas City, Missouri, (S. M. Terbovich, Kansas City, Kansas, James D. Shine, Jr. and Joseph M. Miniace, Kansas City, Missouri, on the brief) for Appellee Local Union No. 41.

Before PICKETT, HILL and HICKEY, United States Circuit Judges.

HILL, Circuit Judge.

This is an appeal from an order dismissing an action brought by the United States Attorney General under 42 U.S.C.A. § 2000e-6(a). The single question on appeal is what Congress intended by requiring that complaints filed under 42 U.S.C.A. § 2000e-6(a) must set forth "facts pertaining to such pattern or practice."

In April, 1969, the United States Attorney General filed a complaint against appellee Gustin-Bacon Division, alleging that the company was engaged in a pattern or practice of employment discrimination against non-whites in the operation of its Kansas City, Kansas, plant. The complaint then particularized the specific practices which allegedly violated 42 U.S.C.A. § 2000e-2(a).[1] Those practices were:

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1. "(a) Failing to hire Negro and other non-white applicants for employment who are more qualified than white applicants who apply for the same or similar positions and are hired.

(b) Failing to assign its Negro and other non-white employees to the more desirable and better-paying jobs while reserving such jobs for its white employees and forcing out of such positions Negroes and other non-whites who have reached such jobs.

(c) Administering and grading tests for assignment to jobs in such manner as to give preferential treatment to white applicants and to exclude Negro and other non-whites similarly qualified.

(d) Failing to provide opportunities for advancement to supervisory positions to its Negro and other non-white employees equal to those opportunities provided to its white employees."

(1) Racially discriminatory hiring; (2) racially discriminatory job assignments; (3) racially discriminatory use of personnel tests in making job assignments; and (4) racially discriminatory promotions to supervisory positions. In addition, it was alleged that the local Teamsters Union was the bargaining agent for the hourly employees and that portions of the collective bargaining agreement operated to perpetuate the effects of the discriminatory practices engaged in by the company. The prayer requested injunctive relief to end the patterns and practices of racial discrimination and their discriminatory effects.

The Union answered, denying that its labor agreement with the company in any way served to perpetuate the effects of a pattern or practice of discrimination and further denied knowledge of the employment practices of the company. The company did not answer, but moved for a more definite statement pursuant to Rule 12(e), F. R. Civ. P., 28 U.S.C.A. The assertion was that the complaint was so vague that the defendant could not reasonably be required to frame a responsive pleading.[2] The United States

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2. Gustin-Bacon sought the following information: "the dates when and names of Negro and other non-white applicants for employment which the defendant allegedly failed to hire and the names of the white applicants who allegedly were hired; the dates when and names of those Negro and other non-white employees which the defendant allegedly failed to assign and the names of the white employees who allegedly were assigned; the dates when and names of those Negroes and other non-whites which the defendant allegedly forced out of such positions; the dates when and names of white applicants and excluded Negro and other non-whites among whom the preferential administration and grading of tests for assignment to jobs was allegedly made; the dates when and names of Negro and other non-white employees to whom the defendant allegedly failed to provide opportunities for advancement to supervisory positions and the names of the white employees who allegedly were provided such opportunities."

Regarding the collective bargaining agreement, Gustin-Bacon requested "the article, paragraph and sentence(s) of said agreement which allegedly perpetuate the effects of the discriminatory acts and practices as described in said Complaint."

opposed the motion but the court granted it, stating that 42 U.S.C.A. § 2000e-6(a)[3] unmistakably requires the complaint to contain facts pertaining to the pattern or practice of discrimination alleged and that the allegations here made were insufficient. The United States declined to comply with the order and requested either certification of requested questions under 28 U.S.C.A. § 1292(b) or alternatively, involuntary dismissal so an appeal could be taken. The court dismissed the suit under Rule 41(b), F. R. Civ. P., 28 U.S.C.A.

The issue appellant raises on appeal is whether the court erred in holding that a complaint filed under 42 U.S.C.A. § 2000e-6(a) must contain facts which are pleaded in greater detail and with more specificity than required by Rule 8(a), F. R. Civ. P., 28 U.S.C.A.[4] There can be no argument that if Rule 8(a) governs the suit, the allegations fully informed the defendants of the nature of the claims made against them and the complaint thereby com-

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3. "(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern of practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) *setting forth facts pertaining to such pattern or practice*, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessay to insure the full enjoyment of the rights herein described." [Emphasis added].

4. "(a) Claims for Relief. A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."

plied with that rule. And no argument can be put forth that under application of Rule 8(a), a Rule 12(e) motion for more definite statement would, in this case, be appropriate. The singular bone of contention here is whether in addition to the Rule 8(a) requirement of setting forth a claim upon which relief may be granted, complaints filed under 42 U.S.C.A. § 2000e-6(a) must allege facts in addition to those set out in this complaint. In the final analysis, the question narrows itself to one of congressional intent: What did Congress mean by requiring a complaint to set forth facts pertaining to a discriminatory pattern or practice?

The Civil Rights Act of 1964 originated in the House, giving the Equal Employment Opportunity Commission authority to investigate, conciliate and, if necessary, initiate civil actions to gain relief from unlawful employment practices. In the Senate, after months of debate, an amendment was offered to the House version placing authority to bring suit in the Attorney General of the United States. Although it was pointed out during the debates that the complaint must set forth facts pertaining to such pattern or practice, we are able to find nothing in that statement or any other statement made on the Senate floor which serves to elucidate what was intended by the setting forth facts requirement of the section. There is no contest as to the plenary power of Congress to statutorily supersede any or all of the Rules. But unless the congressional intent to do so clearly appears, subsequently enacted statutes ought to be construed to harmonize with the Rules, if feasible.[5]

By construing § 2000e-6(a) as the trial court interpreted it, is to reinstate a type of fact pleading which was eradicated by the current Federal Rules. Rule 8 of the Federal Rules of Civil Procedure was originally de-

5. 7 Moore's Federal Practice ¶ 86.04[4], at 4966.

signed to circumvent the morass caused by the code pleading requirement of pleading facts constituting the cause of action. As Professor Moore points out, the "requirement that facts be pleaded is illusory and unsound; and results in a battle over the form of pleadings that does not advance the action to an adjudication on the merits." 2A Moore's Federal Practice ¶ 8.12, at 1692. To reinstate this type of pleading, even in the limited circumstances here involved, is to directly contradict the spirit and purpose of Rule 8(a) and the general concept of modern federal pleading. We find no suggestion in the Civil Rights Act of 1964 nor in the debates prior to its enactment, which supports appellees' contention that Congress intended to require the Attorney General to revert to a detailed pleading of evidentiary matters.[6]

We believe the facts set forth in the Government's complaint are sufficient under the requirements of 42 U.S.C.A. 2000e-6(a). That section authorizes the Attorney General to institute a federal suit "[w]henever [he] has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter . . . ." To do so, a complaint must be filed which sets forth facts "*pertaining* to such pattern or practice." There is no requirement here, as there is in § 2000e-5(a), that the charge set forth facts upon which it is based. We view that section and the one presently under consideration fundamentally variant because of the language employed, the persons governed by the sections, and the historical dis-

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6. Other cases similarly construing § 2000e-6(a) are: United States v. Georgia Power Co., 301 F. Supp. 538 (N. D. Ga. 1969); United States v. International Bro. of Elec. Wkrs., Local No. 683, 270 F. Supp. 233 (S. D. Ohio 1967); United States v. Building & Const. Trades Council of St. Louis, et al., 271 F. Supp. 447 (E. D. Mo. 1966), *rev'd on other grounds*, 416 F.2d 123 (8th Cir. 1969).

satisfaction with fact pleading in judicial forums. We thus do not feel bound by Bowaters Southern Paper Corporation v. Equal Employment Opportunity Commission, Civil No. 5351 (E. D. Tenn. May 5, 1969).

We have searched the debates recorded in volume 110 of the Congressional Record and are unable to find any expressed intent, clear or otherwise, which lends credence to the position assumed by appellees, i.e., a requirement of detailed pleading, setting forth such evidentiary matters as names, dates, places, etc., of discriminatory practices or patterns. Instead, from a full reading of the pertinent section of the Civil Rights Act, we think Congress meant that the Attorney General's belief, that a pattern or practice of racial discrimination in employment exists, must be reflected on the face of the complaint. And that this may be done by a pleading of fundamental facts of the character herein alleged. Here the Attorney General has, by enlarging upon the fundamental claims of job discrimination, alleged additional facts to clearly demonstrate his belief in the existence of an illegal pattern or practice of racial discrimination. The complaint here is adequate under the statute. This legal conclusion is also in keeping with the spirit of the Federal Rules of Civil Procedure, particularly Rule 8, and is consistent with § 2000e-6(a). The appellees are sufficiently apprised of the nature of the action and are able to frame an answer.

Under the circumstances of this case, appellee's motion for more definite statement is in reality but an attempt to discover evidentiary matters. Where, as here, the complaint contains facts reflecting a pattern or practice of racial discrimination, a Rule 12(e) motion is inappropriate and discovery ought to proceed in conformity with Rules 26-37, F. R. Civ. P., 28 U.S.C.A.

We conclude with one final observation. The last sentence of § 2000e-6(b) reads as follows: "It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date *and to cause the case to be in every way expedited.*" This makes it abundantly clear that these controversies are of great urgency and must be disposed of promptly. Our decision rests in part on an awareness of that need for orderly but expeditious handling.

The orders, dismissing the action, granting the motion for more definite statement, and staying the taking of depositions and further discovery are set aside and the cause is remanded for further proceedings in conformity herewith.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General, Plaintiff, v. H. K. PORTER COMPANY, INC., a corporation, Defendant.	**Civil Action 67-363**

Order

This cause having come on for hearing on the defendant's motions to dismiss, for more definite statement, and for joinder of parties defendants and the plaintiff's motion to produce, and the Court having considered the briefs and argument of counsel for the respective parties and being fully advised, and

The Court being of the opinion that:

1. The provision of §707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a), that a complaint filed thereunder set forth facts pertaining to the pattern or practice alleged takes precedence over the notice concept of pleading under Rule 8 of the Federal Rules of Civil Procedure. Since the complaint as presently framed sets forth conclusionary averments only and accordingly does not comply with this requirement of the statute that a complaint set forth facts, the defendant's motion for more definite statement is due to be granted.

2. The United Steelworkers of America, AFL-CIO, and its Local Union No. 2250 are parties needed for just adjudication, they can be served with process, and their joinder will not deprive this Court of jurisdiction over the subject matter of the action. The defendant's motion for an order joining them as parties defendants is accordingly due to be granted.

3. The Court, disagreeing with the defendant's position that the plaintiff's motion to produce should be deferred pending the filing of the more definite statement, is of the opinion that such motion is due to be granted at this time, subject to the qualifications herein set forth which have been agreed upon by counsel for the respective parties.

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court:

1. That the defendant's motion for more definite statement be and the same is hereby granted and that the plaintiff shall serve and file an amended complaint which contains a more definite statement of the facts pertaining to the pattern or practice alleged on or before October 15, 1967, this being the date requested by its attorneys.

2. That the defendant's motion for the joinder as parties defendants of the United Steelworkers of America, AFL-CIO, and its Local Union No. 2250 be and the same is hereby granted, that they be made parties defendants to this action and that the caption of this action shall be amended accordingly, that the plaintiff serve and file an amended complaint, naming them as parties defendants, within ten days after entry of this Order, and that summons be issued and such summons and copies of said amended complaint and of this Order be served upon the said United Steelworkers of America, AFL-CIO, and its Local Union No. 2250 forthwith after said amended complaint is filed.

3. (a) That the plaintiff's motion to produce be and the same is hereby granted, subject to the following qualifications:

(i) The documents described in paragraph 10 of such motion are to be limited to those issued by defendant since July 1, 1965 or in general use by defendant since July 1, 1965.

(ii) The phrase "annually agreed upon" as it appears in the provision of the contract quoted in paragraph 3 of the affidavit in support of such motion, is to be regarded as deleted and the phrase "mutually agreed upon" substituted therefor.

(b) That with the foregoing qualifications, the defendant shall produce all documents described in paragraphs 1 through 10 of such motion, of which it is in possession, custody, or control, at the office of its Connors Works, Birmingham, Alabama, at 9:30 A.M. on Monday, August 7, 1967, and permit the attorneys for plaintiff to inspect, copy or photograph such documents.

4. The defendant's motion to dismiss the complaint as presently framed and the defendant's motion to dis-

miss for failure to join the Unions be and the same are hereby overruled.

DONE, this the 28th day of July, 1967.

/s/ Seybourn H. Lynne
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General, Plaintiff,

v.

H. K. PORTER COMPANY, INC., a Corporation, Defendant.

Civil Action No. CA 67-363

Complaint

The United States of America, by Ramsey Clark, Attorney General, alleges:

1. This is an action brought by the Attorney General on behalf of the United States pursuant to the provisions of 42 U.S.C. 2000e-6(a).

2. This Court has jurisdiction of this action under 42 U.S.C. 2000e-6(b), and 28 U.S.C. 1345.

3. Defendant H. K. Porter Company, Inc. (hereinafter sometimes referred to as "the company"), is incorporated under the laws of the State of Delaware, doing business in the State of Alabama and the City of Birmingham. Through its Connors Steel Division the company operates and maintains mills, plants, and manufacturing facilities employing approximately 700 persons in Birmingham, Alabama.

4. The defendant company is an employer within the meaning of 42 U.S.C. § 2000e-(b), and is engaged in an industry affecting commerce within the meaning of 42 U.S.C. 2000e-(h).

5. The defendant company is engaged in a pattern and practice of discrimination in employment against Negroes on account of their race; such pattern and practice has included,

a. Classifying departments and job categories in such a manner as to provide higher paying jobs for white persons and lower paying jobs for Negroes;

b. Failing to provide opportunities for advancement to Negroes on the same basis as opportunities for advancement are provided to white persons;

c. Assigning Negroes to jobs in limited promotion lines; and

d. Limiting, segregating and classifying employees in such a manner as to deprive or tend to deprive Negroes of employment opportunities or otherwise adversely affect their status on account of race.

6. The foregoing pattern and practice is of such a nature and is intended to deny the full exercise by Negroes of rights secured to them by 42 U.S.C. 2000c-2(a).

WHEREFORE, the plaintiff prays for an order:

1. Enjoining the defendant company, its officers, agents, employees, successors, and all persons in active concert or participation with them from engaging in any racially discriminatory employment practice and specifically from:

a. Classifying departments and job categories in such a manner as to provide higher paying jobs for white persons and lower paying jobs for Negroes;

b. Failing to provide opportunities for advancement to Negroes on the same basis as opportunities for advancement are provided to white persons;

c. Assigning employees to jobs in promotion lines on the basis of race;

d. Limiting, segregating or classifying employees in such a manner as to deprive or tend to deprive Negroes of employment opportunities or otherwise adversely affect their status on account of race; and

e. Failing or refusing to take reasonable steps to correct the effects of the defendant company's past pattern and practice of racial discrimination in employment against Negroes.

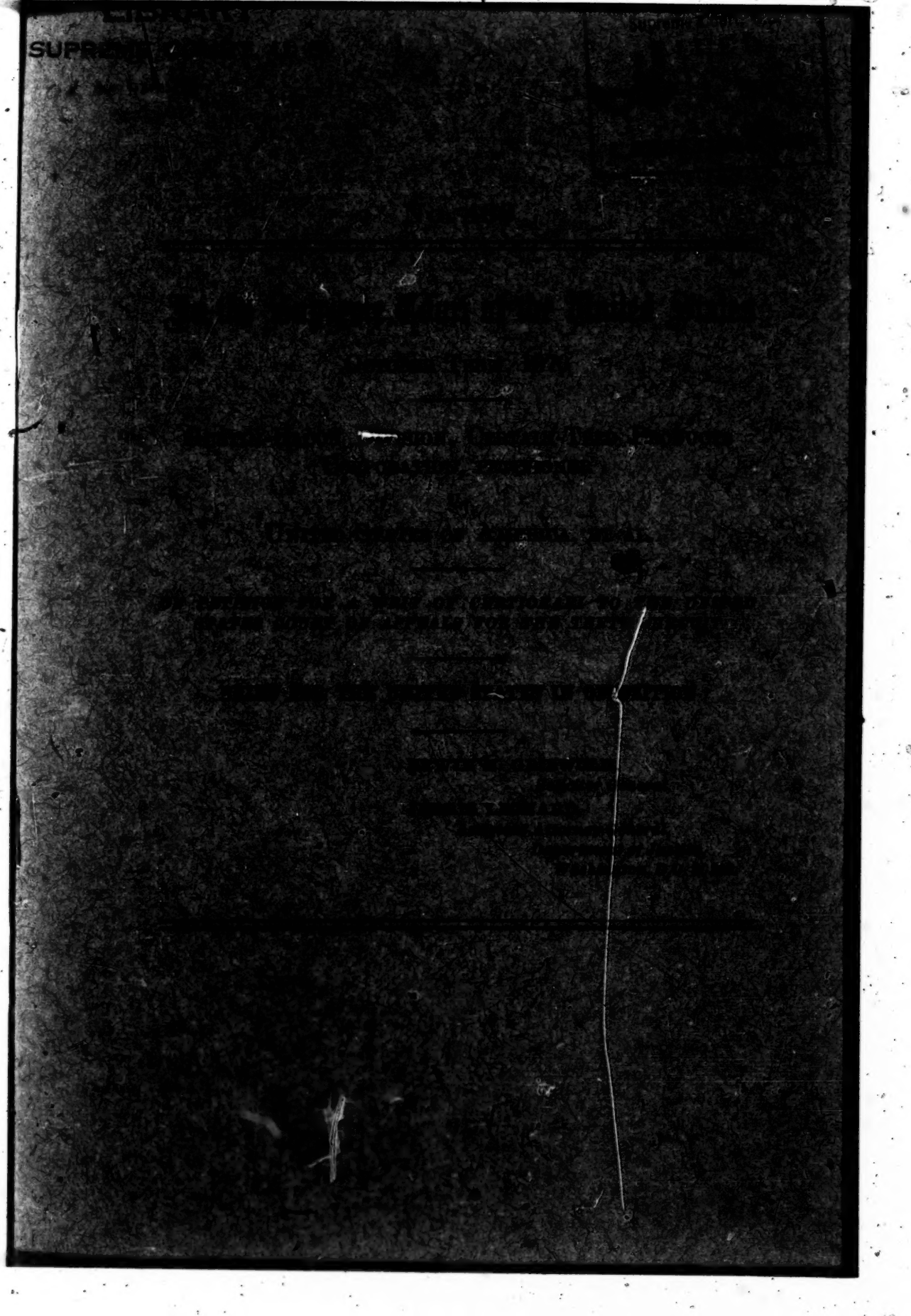
Plaintiff further prays for such other and further relief as the interests of justice may require, together with the costs and disbursements of this action.

/s/ Ramsey Clark
Ramsey Clark
Attorney General

/s/ John Doar
John Doar
Assistant Attorney General

/s/ Macon L. Weaver
Macon L. Weaver
United States Attorney

/s/ Frank M. Dunbaugh
Frank M. Dunbaugh
Attorney
Department of Justice



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 466

GUSTIN-BACON DIVISION, CERTAIN-TEED PRODUCTS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the district court granting petitioner's motion for a more definite statement (Pet. App. 1A) is reported at 302 F. Supp. 759 (D. Kan.). The order of the district court denying the motion of the United States to certify questions under 28 U.S.C. 1292(b) and dismissing the action (Pet. App. 2A) is not reported. The opinion of the court of appeals (Pet. App. 6A–13A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1970. The petition for a writ of certiorari was filed on July 29, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

402-883—70

QUESTION PRESENTED

Whether complaints filed by the Attorney General under Section 707(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6(a), must plead facts in greater detail and with more specificity than is required of other complaints by the notice pleading concept embodied in Rule 8 of the Federal Rules of Civil Procedure.

STATUTES AND RULES INVOLVED

Section 707(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6(a), provides in pertinent part:

> (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of [denying persons the rights guaranteed them under this statute] * * *, and that the pattern [or] practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint * * * (2) setting forth facts pertaining to such pattern or practice * * *

Fed. R. Civ. P. 8(a) provides in pertinent part:

> A pleading which sets forth a claim for relief * * * shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief * * *

Fed. R. Civ. P. 8(e) provides in pertinent part:

> (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

Fed. R. Civ. P. 12(e) provides in pertinent part:

> If a pleading * * * is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. * * *

STATEMENT

This action was commenced on April 24, 1969, by the filing of a complaint under the equal employment opportunities provision of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) against Gustin-Bacon Division of Certain-Teed Products Corporation (the company) and Local 41 of the International Brotherhood of Teamsters (the union), alleging that the company was engaged in a pattern or practice of discrimination against Negroes and other nonwhites on account of their race in the operation of its Kansas City, Kansas plant and that the collective bargaining agreement perpetuated the effects of past discrimination. (Pet. 4-5). In addition to identifying the nature and jurisdictional basis of the suit and the parties, the complaint alleged the following specific discriminatory practices: (1) racially discriminatory hiring; (2) racially discriminatory job assignments; (3) racially discriminatory administration and grading of personnel tests; and (4) racially discriminatory promotion to supervisory positions.

Although the union defendant filed an answer in response to the complaint, the company filed a motion

under Rule 12, Fed. R. Civ. P., for a more definite statement, seeking the names of the victims and beneficiaries of the alleged discrimination, the dates on which the discriminatory acts occurred, and other factual details (Pet. 6–7). The district court granted the motion, on the theory that the statutory language of Section 707(a) of the Act (42 U.S.C. 2000e–6(a)), calling upon the Attorney General to set forth "facts pertaining to the pattern or practice" of discrimination, imposed a duty to plead facts in detail and with particularity. In so holding, the district court concluded that Section 707(a) superseded and imposed a greater pleading burden than Rule 8 of the Federal Rules of Civil Procedure. When the United States declined to amend, the district court entered an order dismissing the complaint and the government appealed.

The court of appeals reversed, holding that neither the language of Section 707(a) nor its legislative history suggested any intent to supersede, or to supplement, the pleading standards specified in Rule 8. The court held that the statute merely "meant that the Attorney General's belief that a pattern or practice of racial discrimination in employment exists, must be reflected on the face of the complaint" in accordance with the ordinary pleading standards of Rule 8 (Pet. App. A12). It ruled that, so judged, the complaint

was clearly sufficient and accordingly remanded the case to the district court for further proceedings. The company has petitioned this Court for review.

ARGUMENT

The decision below is correct, and there is no conflict of decisions or other reason for further review.

1. Petitioner contends that the plain language of Section 707(a) is inconsistent with Rule 8 and "compels the conclusion that the requirement takes precedence over Rule 8 in 'pattern or practice' suits" (Pet. 19–20). Although Congress may have the power to supersede the Federal Rules, unless the Congressional intent to do so is clearly stated, subsequently enacted statutes are properly construed so as to harmonize with the Rules. See 7 Moore, Federal Practice (2d ed. 1968) ¶ 86.04[4], at 4966 and cases there cited. As the court of appeals correctly noted (Pet. App. 11–12), no such intention is indicated by the language of Section 707 (a) or its legislative history.

2. Since no other court of appeals has considered this question, there is no conflict among circuits. The appellate decisions to which petitioner calls attention involve neither Section 707(a) of the Act nor the question before this Court. At the district court level, all of the courts save one (apart from the decision reversed below) which have passed on this issue have resolved it in con-

formity with the decision below.[1] We believe that the decision below will clarify any disagreement on this issue[2] which may exist at the district court level and that its consideration by this Court is not required at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

SEPTEMBER 1970.

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[1] See *United States* v. *Georgia Power Co.*, 301 F. Supp. 538, 542–544 (N.D. Ga.); *United States* v. *International Brd. of Elec. Workers, Local 683*, 270 F. Supp. 233, 234–235 (S.D. Ohio); *United States* v. *Building & Constr. Trades Council*, 271 F. Supp. 147, 153 (E.D. Mo.); *United States* v. *International Brd. of Elec. Workers, Local 48*, No. C–67–575 (N.D. Ohio, Sept. 11, 1967); *United States* v. *International Brd. of Elec. Workers, Local 212*, No. 6973 (S.D. Ohio, Sept. 6, 1967); *United States* v. *Dillon Supply Co.*, No. 1973 (E.D. N.C., May 4, 1967); *United States* v. *International Ass'n of Bridge, Structural and Ornamental Ironworkers*, No. 8536 (S.D. Ohio, Feb. 28, 1968). Contra, *United States* v. *H. K. Porter Co.*, No. 67–363 (N.D. Ala., July 28, 1967) (Pet. App. 13A), appeal docketed on other grounds, No. 27,703 (C.A. 5). See also *United States* v. *St. Louis-San Francisco Railway*, No. 67–C–213(1) (E.D. Mo., Jan. 5, 1968) (Section 707(a) imposes no greater pleading requirement than Rule 8, although motion granted under Rule 12(e).)

[2] In every complaint currently filed by the United States under Section 707, the allegations are set forth with substantially the same specificity as in the complaint herein.

U.S. GOVERNMENT PRINTING OFFICE: 1970